

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VALERIE J.,

Plaintiff,

v.

5:23-CV-0413
(ML)

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

LEGAL AID SOCIETY OF MID-NY
Counsel for the Plaintiff
221 S. Warren Street - Suite 310
Syracuse, New York 13202

RAYMOND O. RECCHIA, ESQ.

SOCIAL SECURITY ADMINISTRATION
Counsel for the Defendant
6401 Security Boulevard
Baltimore, Maryland 21235

FERGUS J. KAISER, ESQ.
Special Assistant U.S. Attorney

MIROSLAV LOVRIC, United States Magistrate Judge

ORDER

Currently pending before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on August 27, 2024, during a telephone conference

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination was not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by Plaintiff in this appeal.

After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is

ORDERED as follows:

- 1) Plaintiff's motion for judgment on the pleadings (Dkt. No. 9) is GRANTED.
- 2) Defendant's motion for judgment on the pleadings (Dkt. No. 11) is DENIED.
- 3) The Commissioner's decision denying Plaintiff Social Security benefits is REVERSED.
- 4) This matter is REMANDED to the Commissioner, without a directed finding of disability, for further administrative proceedings consistent with this opinion and the oral bench decision, pursuant to sentence four of 42 U.S.C. § 405(g).
- 5) The Clerk of Court is respectfully directed to enter judgment, based upon this determination, REMANDING this matter to the Commissioner for further administrative proceedings consistent with this opinion and the oral bench decision, pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

Dated: September 5, 2024
Binghamton, New York

A handwritten signature in black ink, reading "Miroslav Lovric", written over a horizontal line.

Miroslav Lovric
United States Magistrate Judge
Northern District of New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
VALERIE BARBARA JUKNEVICIUS,

Plaintiff,

vs.

Civil Action No. 5:23cv413

MARTIN J. O'MALLEY,
COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a Decision from a
Teleconference Hearing held on August 27, 2024, the
HONORABLE MIROSLAV LOVRIC, United States Magistrate
Judge, Presiding.

A P P E A R A N C E S

For Plaintiff: LEGAL AID SOCIETY OF MID-NY
221 S. Warren Street, Suite 310
Syracuse, New York 13202
BY: RAYMOND O. RECCHIA, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
OFFICE OF PROGRAM LITIGATION, OFFICE 2
6401 Security Boulevard
Baltimore, Maryland 21235
BY: FERGUS J. KAISER, ESQ.

*Lisa M. Mazzei, RPR
Official United States Court Reporter
10 Broad Street
Utica, New York 13501
(315) 266-1176*

1 (The following is an excerpt of a
2 teleconference hearing held on 8/27/2024.)

3 THE COURT: All right. Well, the Court is going to
4 begin its decision, analysis and reasoning as follows:

5 So, first, the Court begins by indicating that
6 Plaintiff has commenced this proceeding pursuant to Title 42
7 U.S.C. Section 405(g) to challenge the adverse determination
8 by the Commissioner of Social Security finding that she was
9 not disabled at the relevant times and therefore ineligible
10 for the benefits that she sought.

11 By way of background, the Court notes as follows:
12 Plaintiff was born in 1977. She is currently approximately
13 47 years of age. She was approximately 43 years of age on
14 the date of her application for benefits.

15 Plaintiff stands approximately 5 feet 3 inches in
16 height and weighs approximately 230 pounds. Plaintiff is a
17 high school graduate who attended regular education classes
18 and attended college for two years but did not obtain a
19 degree. Her employment history includes work as a cashier,
20 house cleaner, and a bookkeeper.

21 At the time of her administrative hearing on
22 December 7, 2021, Plaintiff lived alone but saw her
23 six-year-old son on a near-daily basis. She also has an
24 adult daughter who lives out of state.

25 Procedurally, the Court notes as follows for this

1 case:

2 Plaintiff applied for Title II and Title XVI
3 benefits on October 8th of 2020, alleging an onset date of
4 April 28, 2017. In support of her applications for benefits,
5 Plaintiff claims disability based on a number of physical and
6 mental health impairments including back pain, stage three
7 kidney disease, schizophrenia, depression, and bipolar
8 disorder.

9 Administrative Law Judge Jennifer Gale Smith
10 conducted a hearing on December 7, 2021, to address
11 Plaintiff's applications for benefits. ALJ Smith issued an
12 unfavorable decision on December 20, 2021. That decision
13 became the final determination of the agency on December 20,
14 2022, when the Appeals Council denied Plaintiff's request for
15 review.

16 On March 7, 2023, the Commissioner granted an
17 administrative request filed by Plaintiff's counsel extending
18 the deadline for commencing a civil action to April 21 of
19 2023. This action was commenced on April 3, 2023, and it is
20 therefore timely.

21 In her December 20, 2021 decision at issue in this
22 case, the ALJ first determined that Plaintiff met the insured
23 status requirements of the Social Security Act through
24 December 31, 2020, and then commenced the familiar five step
25 test for determining disability.

1 At step one, the ALJ concluded that Plaintiff had
2 not engaged in substantial gainful activity since the alleged
3 onset date of April 28, 2017.

4 At step two, the ALJ concluded that Plaintiff had
5 the following severe impairments: anxiety disorder,
6 depressive disorder, bipolar disorder, substance abuse
7 disorder and sustained remission, cannabis use disorder,
8 posttraumatic stress disorder, obesity, stage III kidney
9 disease, hepatitis C, degenerative disc disease, mild
10 peripheral neuropathy, cervicalgia, migraine headaches,
11 asthma, diabetes with mild neuropathy, chronic right heart
12 failure and anemia.

13 At step three, the ALJ concluded that plaintiff did
14 not have an impairment or combination of impairments that met
15 or medically equal the severity of one of any listed
16 impairments. In making this determination, the ALJ expressly
17 considered the following listings: Listing 1.15, which deals
18 with disorders of the skeletal spine. Listing 1.16 dealing
19 with lumbar spinal stenosis. Listing 3.03 dealing with
20 asthma. Listing 4.012 dealing with chronic heart failure.
21 Listing 6.05 dealing with chronic kidney disease. Listing
22 7.18 dealing with repeated complications of hematological
23 disorders. Listing 11.17 dealing with neurodegenerative
24 disorders. Listing 12.02 dealing with neurocognitive
25 disorders. Listing 12.04 dealing with depressive bipolar and

1 related disorders. Listing 12.06 dealing with anxiety and
2 obsessive compulsive disorders. And lastly, listing 12.15
3 dealing with trauma and stressor-related disorders.

4 Next, the ALJ determined that Plaintiff has the
5 residual functional capacity, also known as RFC, to perform
6 less than the full range of light work. Specifically, the
7 ALJ found Plaintiff should not work at unprotected heights;
8 balance, climb ladders, ropes, or scaffolds; or work in close
9 proximity to dangerous machinery or moving mechanical parts
10 of equipment. The ALJ further found Plaintiff can frequently
11 reach and can occasionally kneel, crouch, crawl, climb ramps
12 and stairs and stoop. The ALJ also found that the Plaintiff
13 should not have concentrated exposure to respiratory
14 irritants, extreme heat and cold temperatures or humidity.
15 With regard to mental health impairments, the ALJ found
16 Plaintiff should work at simple, routine, and repetitive
17 tasks and should work in a low stress job defined as
18 occasional decision making, occasional judgment required, and
19 occasional changes in the work setting. The ALJ further
20 opined that Plaintiff should work at goal-oriented work
21 rather than production pace rate work. And that Plaintiff
22 should be limited to occasional contact with coworkers,
23 supervisors, and the public.

24 At step four, the ALJ relied on the vocational
25 expert testimony to determine that Plaintiff is unable to

1 perform any past relevant work. Again relying on the
2 vocational expert testimony, the ALJ found that considering
3 Plaintiff's age, education, work experience, and RFC, that
4 there were jobs existing in significant numbers in the
5 national economy that Plaintiff can perform. Accordingly,
6 the ALJ found that Plaintiff was not disabled from her
7 alleged onset date of April 28, 2017 through the date of the
8 ALJ's decision.

9 Turning now to Plaintiff's arguments, I begin first
10 by indicating, as the parties know, this Court's functional
11 role in this case is limited and extremely deferential. I
12 must determine whether correct legal principles were applied
13 and whether the determination is supported by substantial
14 evidence which is defined as such relevant evidence as a
15 reasonable mind would find sufficient to support a
16 conclusion. As the Second Circuit noted in *Brault v. Social*
17 *Security Administration Commissioner*, that's at 683 F.3d 443,
18 a 2012 case, this standard is demanding more so than the
19 clearly erroneous standard. The Court noted in *Brault* that
20 once there is a finding of fact, that fact can be rejected
21 only if a reasonable factfinder would have to conclude
22 otherwise.

23 In this case, Plaintiff raises in her filings four
24 primary contentions in the proceedings:

25 First, Plaintiff argues that the ALJ erred in

1 evaluating the medical opinion evidence related to
2 Plaintiff's mental health impairments, particularly
3 Plaintiff's ability to maintain a regular schedule.

4 Second, Plaintiff argues that the ALJ erred in
5 evaluating the medical opinion evidence related to
6 Plaintiff's physical impairments, particularly with regard to
7 Plaintiff's ability to perform frequent reaching.

8 Third, Plaintiff argues that the ALJ failed to
9 properly evaluate Plaintiff's ability to handle stress in the
10 workplace.

11 And fourth, Plaintiff argues that the ALJ failed to
12 properly evaluate the vocational expert testimony.

13 The Court begins its decision and analysis as
14 follows:

15 The Court finds that remand for further
16 administrative findings in this case is required to properly
17 evaluate the medical opinion and other evidence related to
18 Plaintiff's ability to maintain and keep a regular schedule.

19 The Court begins by noting that Plaintiff is
20 currently enrolled in an Opioid Treatment Program. At her
21 December 2021 hearing, Plaintiff testified that she had
22 maintained her sobriety for the past five years. As part of
23 her treatment program, Plaintiff attends a daily methadone
24 clinic and participates in monthly counseling sessions.
25 Plaintiff testified that she woke up at 2 a.m. each weekday

1 in order to be ready for a 4:30 a.m. pickup by a Medicaid
2 shuttle with a 90-minute commute to the clinic. Depending on
3 the daily appointment schedule, the shuttle brought Plaintiff
4 back home between 7:30 a.m. and 11:30 a.m. Plaintiff
5 testified that she was exhausted after her appointments but
6 that compliance with methadone treatment was necessary not
7 only for her sobriety, but as a condition of her current
8 housing and food stamp benefits.

9 Plaintiff's treating licensed therapist,
10 Ashley Kessler, prepared a February 12, 2021 Psychiatric
11 Functional Assessment that was cosigned by psychiatrist
12 Dr. Tolani Adjabe. As part of that assessment, Ms. Kessler
13 opined that Plaintiff would be absent from work more than
14 four days per month and late to work more than four days per
15 month as a result of her mental health symptoms or treatment.
16 In a November 9, 2021 letter clarifying her opinion,
17 Ms. Kessler explained that Plaintiff's mental health symptoms
18 included mood irregularities, panic attacks, depressive
19 episodes, suicidal ideations, and "fight or flight" PTSD
20 triggers. Ms. Kessler, who had been treating Plaintiff since
21 2019, further opined that Plaintiff tends to isolate herself
22 and needs to reach out to a trusted counselor when her mental
23 health symptoms arise, hindering her ability to attend work
24 regularly or be punctual to work. In separate
25 correspondence, Ms. Kessler opined that Plaintiff's

1 psychiatric symptoms were distinct from her substance abuse
2 history.

3 Ms. Kessler's opinion is the only comprehensive
4 treating source opinion in the record, and the only opinion
5 to express concerns about Plaintiff's ability to maintain
6 regular attendance and punctuality at work. Two consultative
7 psychiatric examiners and two non-examining state agency
8 psychiatric consultants identified no limitations in this
9 area.

10 The ALJ rejected Ms. Kessler's opinion regarding
11 absenteeism and punctuality, stating the claimant's regular
12 attendance at her methadone clinic for two to three years, is
13 inconsistent with Ms. Kessler's and Dr. Adjabe's estimates as
14 to absences. It appears that these estimates are speculative
15 at best. This is what the ALJ concluded.

16 The Second Circuit recently held that "relying on
17 attendance at medical appointments is unhelpful in
18 determining whether an individual with significant
19 psychiatric issues can consistently show up and successfully
20 function in a work environment." See case of *Rucker v.*
21 *Kijakazi*, 48 F.4th 86, at page 93, and that's a Second
22 Circuit 2022 case. Recent district court decisions have
23 followed the Second Circuit's instruction and remanded where
24 the ALJ relied solely on an individual's ability to maintain
25 regular attendance at methadone treatment to determine that

1 he or she could meet the ordinary demands of regular work
2 attendance and punctuality. See case *Bellini v. O'Malley*.
3 That's 22-CV-9639. That's found at 2024 WL 1328383 at page
4 8. That's a Southern District New York March 28, 2024 case.
5 See also case of *Brian D. v. Commissioner of Social Security*,
6 21-CV-1368. That is a Magistrate Judge Hummel case. That
7 can be found at 2023 WL 1765429 at pages 9 through 10, and
8 that is a Northern District New York case. Decision issued
9 February 3rd of 2023.

10 Because Plaintiff's dedication in meeting the
11 onerous travel and time requirements necessary to maintain
12 her sobriety is the sole reason that the ALJ identified for
13 rejecting Ms. Kessler's opinion regarding attendance and
14 punctuality, remand for further administrative proceedings is
15 required.

16 The Court notes that the vocational expert
17 testified at the December 2021 hearing, based on her
18 experience, that "no more than one day of missed work per
19 month is acceptable. And I consider arriving late or leaving
20 early the same as an absence." Therefore, the ALJ's error in
21 evaluating Plaintiff's ability to maintain regular attendance
22 and punctuality cannot be considered harmless and remand is
23 required.

24 This Court finds that Plaintiff's remaining
25 arguments do not present independent grounds for remand, so I

1 will address them in a summary fashion. That being said,
2 reconsideration of Plaintiff's ability to maintain regular
3 attendance and punctuality along with any new evidence
4 introduced on remand will necessarily impact many of the
5 discrete challenges raised in Plaintiff's brief.

6 The ALJ expressly rejected the portion of
7 consultative examiner Dr. Elke Lorensen's opinion that
8 Plaintiff had moderate limitations in reaching, citing a lack
9 of support in the record. Plaintiff contends this was error,
10 but has not identified objective evidence to support this
11 claim. At her December 2021 hearing, Plaintiff testified
12 that her primary physical functional limitations involve
13 walking and lifting. The ALJ's decision contains a lengthy
14 summary of the longitudinal record including treatment notes
15 and imaging reports. Although Plaintiff's brief identifies a
16 number of her physical impairments that potentially impact
17 her ability to reach, it does not cite any treatment notes or
18 medical reports that are more restrictive than the "frequent"
19 reaching in the ALJ's RFC determination.

20 The ALJ also found the opinions of two
21 non-examining state agency consultants regarding physical
22 functional limitations be persuasive, and the opinions of two
23 non-examining state agency consultants regarding psychiatric
24 functioning limitations to be partially persuasive.

25 Plaintiff contends that the ALJ's analysis was

1 erroneous because the record was not complete at the time
2 that each of these opinions were issued. However, Plaintiff
3 has not identified any worsening of her symptoms or
4 functional limitations that would render any of these
5 opinions "stale" and thus unreliable. Indeed, the ALJ's
6 decision cited record and testimonial evidence that
7 Plaintiff's physical and psychiatric symptoms had generally
8 improved as she progressed in treatment.

9 The record contains two psychiatric consultative
10 examination reports. Dr. Dennis Noia examined Plaintiff in
11 August 2018. He opined that Plaintiff had no more than mild
12 limitations in most functional areas, but had marked
13 limitations in regulating emotions, controlling behavior, and
14 managing well-being. Dr. Dante Alexander examined Plaintiff
15 in February of 2021. He opined that Plaintiff had no more
16 than mild limitations in all functional areas, including
17 regulating emotions, controlling behavior, and managing
18 well-being. Although the ALJ did not rely entirely on either
19 opinion, the ALJ found Dr. Alexander's opinion more
20 persuasive.

21 Plaintiff contends that the ALJ failed to properly
22 evaluate these opinions. However, the ALJ expressly
23 considered their supportability and consistency against the
24 longitudinal medical record and Plaintiff's activities of
25 daily living. The Court notes that Dr. Noia's opinion was

1 prepared relatively close in time to Plaintiff's April 2017
2 suicide attempt and subsequent psychiatric hospitalizations
3 and that Dr. Alexander's less restrictive opinion was
4 prepared after Plaintiff had progressed in both mental health
5 and substance abuse treatment. To the extent that Plaintiff
6 argues that the ALJ should have interpreted the evidence
7 differently, such challenges must be rejected, because they
8 are premised entirely upon a disagreement over how the ALJ
9 resolved arguably conflicting evidence. It is not sufficient
10 that reasonable parties could interpret the evidence
11 differently, and it is not the function of this reviewing
12 Court to reweigh that evidence.

13 The ALJ's RFC determination limited Plaintiff to
14 low stress jobs, defined as occasional decision-making,
15 occasional judgment required and occasional changes in the
16 work setting. ALJ further limited Plaintiff to goal-oriented
17 work rather than productive pace rate work, and only
18 occasional contact with coworkers, supervisors and the
19 public.

20 Plaintiff contends that the ALJ failed to properly
21 evaluate Plaintiff's ability to handle stress. In her
22 decision, the ALJ considered evidence related to Plaintiff's
23 ability to handle stress including medical observations,
24 Plaintiff's testimony, and her documented activities of daily
25 living. Thus, the ALJ provided a "thorough, individualized

1 assessment" of Plaintiff's ability to handle stress, and
2 incorporated reasonable limitations into the RFC
3 determination.

4 At the December 2021 hearing, the vocational expert
5 identified three representative occupations that an
6 individual with Plaintiff's RFC could perform. That being
7 routing clerk, marker, and photocopy machine operator.
8 Plaintiff contends that the ALJ failed to adequately
9 investigate a conflict between the constant reaching required
10 by the marker position and frequent reaching in the RFC.
11 However, even with that unresolved conflict, the vocational
12 expert identified two other positions existing in significant
13 numbers in the national economy. Courts have regularly held
14 that where a vocational expert identifies at least one job
15 existing in significant numbers, the Commissioner's
16 obligation at step five is satisfied. Therefore, any error
17 in including the marker position at step five would be
18 harmless.

19 Finally, Plaintiff contends that the RFC
20 determination is inconsistent with the jobs identified by the
21 vocational expert, which all require a Reasoning Level of
22 Two. However, a growing number of district courts have held
23 that jobs with reasoning levels of two are compatible with
24 limitations to simple, routine, low stress work. See case of
25 *Timothy M. v. Kijakazi*. That is found at 20-CV-310. That is

1 a Chief Judge Sannes case, 2021 WL 4307455 at page 16. And
2 that was issued by Chief Judge Sannes of the Northern
3 District of New York on September 22 of 2021. And therein
4 Chief Judge collected a variety of cases on this point.

5 Accordingly, it is the decision of this Court that
6 Plaintiff's motion for judgment on the pleadings is granted.
7 Defendant's motion for judgment on the pleadings is denied.
8 And this matter is reversed and remanded to the Commissioner
9 pursuant to sentence four of Title 42 U.S.C. Section 405(g)
10 for further proceedings consistent with this decision and
11 order.

12 That constitutes the decision and order of the
13 Court. As I indicated, I will have the court reporter
14 transcribe solely my decision as I have set it forth here on
15 the record. I will then append that decision to a summary
16 order and then I will file that in the docket so the parties
17 will have my decision also in writing.

18 That concludes our proceeding for today, and I hope
19 everybody has a good rest of the day. And court stands
20 adjourned. Thank you all.

21 (Court adjourned, 1:38 p.m.)
22
23
24
25

CERTIFICATE OF OFFICIAL REPORTER

I, LISA M. MAZZEI, RPR, Official U.S. Court
Reporter, in and for the United States District
Court for the Northern District of New York, DO
HEREBY CERTIFY that pursuant to Section 753, Title
28, United States Code, that the foregoing is a true
and correct transcript of the stenographically
reported proceedings held in the above-entitled
matter and that the transcript page format is in
conformance with the regulations of the Judicial
Conference of the United States.

Dated this 4th day of September, 2024.

/S/ LISA M. MAZZEI

LISA M. MAZZEI, RPR
Official U.S. Court Reporter

LISA M. MAZZEI, RPR
Official U.S. Court Reporter